INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	3
Argument	11
Conclusion	16

CITATIONS

Cases:

Battle v. *United States*, 206 F. 2d 440	12
Corbin v. *United States*, 253 F. 2d 646	11
Costner v. *United States*, 271 F. 2d 261, certiorari denied, 362 U.S. 952	11
Cratty v. *United States*, 163 F. 2d 844	11
Ege v. *United States*, 242 F. 2d 879	11
Lockhart v. *United States*, 183 F. 2d 265	12
On Lee v. *United States*, 343 U.S. 747	15
Picciurro v. *United States*, 250 F. 2d 585	11
Sherman v. *United States*, 356 U.S. 369	13, 14
Silverman v. *United States*, 365 U.S. 505	15
Sorrells v. *United States*, 287 U.S. 435	13
United States v. *DiDonna*, 276 F. 2d 956	14
United States v. *Kabot*, 295 F. 2d 848, certiorari denied, 369 U.S. 803	14
United States v. *Pagano*, 207 F. 2d 884	14

Statute and Rules:

18 U.S.C. 201	2
Rule 29, F.R. Crim. P.	11
Rule 52(b), F.R. Crim. P.	11

653758—62——1

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 236

GERMAN S. LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported (R. 183).

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1962. The petition for a writ of certiorari was filed on July 7, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was entrapped, as a matter of law, into offering and giving a bribe to an internal revenue agent.

2. Whether the trial court erred in its instructions on entrapment.

3. Whether an electrical recording, which corroborated the testimony of an internal revenue agent of his conversation with petitioner, was properly received in evidence.

STATUTE INVOLVED

Section 201 of Title 18 U.S.C. provides as follows:

> Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such

money or value of such thing or imprisoned not more than three years, or both.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the District of Massachusetts on counts 2, 3, and 4 of an indictment charging him with attempted bribery of an Internal Revenue agent. He was sentenced to imprisonment for a period of one year (R. 2–5, 6–7). The court of appeals affirmed.

Count 1 of the indictment (on which petitioner was acquitted) charged that on or about October 21, 1961, at North Falmouth, Massachusetts, petitioner gave $420 to Roger S. Davis, an Internal Revenue agent, with intent to induce Davis to refrain from making an examination of the records of sales and receipts of the bar and lounge at Clauson's Inn for the years 1959, 1960, and the first two quarters of 1961, for the purpose of computing the cabaret tax due on the sales and receipts. Count 2 charged that on or about October 24, 1961, petitioner gave Davis $200 with intent to influence him to aid in committing a fraud on the United States by concealing from the Internal Revenue Service the sales and receipts and any cabaret tax due for the operations of the bar and lounge for the years 1959, 1960, 1961, and thereafter. Count 3 charged that on October 24, 1961, petitioner promised Davis $200 to be paid on or about November 24, 1961, with intent to influence him to aid in committing the aforesaid fraud on the United States. Count 4 charged that on October 24, 1961, petitioner promised Davis an expense paid weekend accommodation for Davis and his family

at Clauson's Inn, with intent to influence him to aid in committing the aforesaid fraud on the United States (R. 2–5).

Prior to trial, petitioner filed a motion to suppress as evidence a recording of a conversation between petitioner and Agent Davis in petitioner's office on October 24, 1961 (R. 5–6). This motion was denied (R. 165). The evidence at the trial and on the motion to suppress may be summarized as follows:

1. During late August 1961, Internal Revenue Agent Davis was assigned by his group supervisor to the Cape Cod area for various duties, including investigation of possible evasion of excise taxes (R. 62). On August 31 he visited the bar and lounge at Clauson's Inn in North Falmouth, Massachusetts. He introduced himself to petitioner, who was the manager and operator, and inquired whether they had dancing, singing, or other forms of entertainment. Petitioner replied that they did not (R. 170). Davis showed him an advertisement in the Cape Cod Guide for August 26, reading in part, "Clauson's Inn and Country Club. Visitors to the Cape are invited to join us for luncheon, cocktails, dinner, dancing and entertainment." Petitioner replied that he was not responsible for the advertisement (R. 9–10, 171). After further conversation with petitioner, Davis left. He returned that evening and was told that petitioner was not on the premises (R. 10, 172). The following day he prepared a report to his group supervisor, stating as follows: "Subject: Cabaret surveillance, August 31, 1961. 1. Clauson's Inn, potential delinquent, North Falmouth, bar and lounge. Trio plays six nights.

Jazz concert Sundays. When trio plays there is some dancing although management claims that it does not allow such dancing. Will follow up" (R. 11; Gov. Ex. 2).

2. Davis made another visit to Clauson's Inn the evening of October 21. He saw patrons dancing to the music of a trio. A waitress sang one song. He then talked further with petitioner, who told him that the trio played Friday and Saturday nights and that there was a piano player on Tuesday, Wednesday, and Thursday nights. Petitioner said that the juke box was used when the band was having a break. Davis expressed the opinion that the Inn was liable for a cabaret tax and asked when and where he could examine the books. Petitioner stated that his books were at the Inn, but he wished to avoid any inconvenience from an examination of the records (R. 11–12).

Petitioner suggested that they go into his office, where the discussion was continued. Davis told him that if there was a tax due there would also be a penalty for failure to file. Petitioner stated that he wished to avoid "this aggravation" and asked if they could not reach some sort of agreement (R. 13). He said he did not want to insult Davis but could not Davis drop the case if he wanted to. Davis told him that he could not and that he had filed a report of his previous visit (R. 13). A little later petitioner again said that he did not want to insult Davis and that he did not know whether to take him into his confidence or not. Davis made no response. Petitioner opened the safe and laid some money at the desk where Davis was sitting. Petitioner said, "You can

drop this case. Here's $200. Buy your wife a present. And I'll have more money for you at Christmas time. This is all I have now" (R. 13–14). Davis refused. Petitioner urged him to take it and added, "Why don't you bring your wife and family down here for a week as my guest and stay at Clauson's Inn. Relax and play golf" (R. 14). Davis again refused and made further inquiries about the business. Petitioner added some more bills and said that he did not wish to be bothered by filing any past tax returns, but that he would file a return for the current quarter. After considerable discussion, Davis took the bills, which now amounted to $420, and left about 10:00 p.m. Petitioner told Davis that he would file a return for the current quarter and that Davis should come back the following Tuesday (R. 14–15).

Davis immediately drove to another establishment in the area and placed a call to the District Director's office in Boston. Since there was no one at the office, Davis called another agent, who told him that he would contact the group supervisor and have him call Davis back. About 10:30 Davis received a call from his group supervisor and recounted the incident to him (R. 15). These telephone calls were corroborated by the other agent and by the group supervisor (R. 64–65). On the morning of Monday, October 23, Davis turned the $420 over to the regional inspector and gave him a sworn statement as to the events of October 21 (R. 16, 96; Gov. Ex. 7).

On the evening of October 23, Davis returned to Falmouth in the company of four Internal Revenue inspectors. The following morning Davis was in-

structed to return to Clauson's Inn to keep his appointment with petitioner and to pretend to play along with his scheme, particularly drawing attention to the money which had already been paid. Davis was searched and the amount of money on his person was determined. Two electronic devices were placed on his person. One was a Schmidt radio transmitter, which was intended to transmit any conversation to the inspectors, who would be waiting outside in a car. This device failed to operate. The other was a Minifon, a self-contained recording unit (R. 16–17, 67–68).

At the appointed hour Davis met petitioner at Clauson's Inn, and petitioner invited Davis to lunch. Davis declined and suggested that they talk in petitioner's office. Davis took a form 720, federal excise tax return, from his brief case, explained it to petitioner and started questioning him about his receipts, which petitioner stated totaled about $160,000 per year. Petitioner said that he had never thought it was necessary to file a return and that he wanted Davis to take him into his confidence and advise him if anything came up. Davis, after a series of computations, told petitioner that the amount due would be over $15,000. Petitioner gave Davis four fifty-dollar bills and told him that he would have some more money for him the next month. Petitioner mentioned that he had given Davis $420 on October 21 (R. 17–19). Petitioner said that he would like to get by without filing until Davis advised him that the pressure in Davis' office made filing a current return necessary. He asked Davis whether it would be a

good idea to put up a no-dancing sign "to make it look good" (R. 20). When Davis said he might bring his wife down, petitioner told him to do that and to be his guest. He said he would have another $200 for Davis the next month (R. 21).

Following this interview, Davis met with the four inspectors, who removed the two electronic devices. They also found four fifty-dollar bills on his person, in addition to the money which he was previously found to be carrying (R. 23, 69; Gov. Ex. 5). Davis then listened to a playing of the recording, which he testified at petitioner's trial was accurate (R. 24). The recording, which was played for the jury, corroborated Davis' account of the conversation in detail (R. 78–94).

4. Petitioner testified in his own behalf. He stated that the no-dancing sign had been up in the lounge for nearly three years (R. 104–105). When Davis talked with him on the occasion of his first visit, August 31, 1961, petitioner told him he had not filed a cabaret tax because he was not required to (R. 103). On October 17 the bar had switched to entertainment, which included dancing and singing (R. 102). When Davis returned on October 21, petitioner told him that he now came under the cabaret tax, since there had been a change in the Inn's operation since October 17 (R. 108, 102). He told Davis that his books were in order and he wanted Davis to prepare and file his cabaret tax whenever it came due on his own time. He took $200 out of his pocket and then added another $100 from the safe, but Davis said that was not enough, he could not jeopardize his position for

that amount. Petitioner testified that he told Davis that he was not asking him to jeopardize his position, but merely to prepare his returns and to get his books properly in order (R. 111). He then asked his cashier if she had any big money and she brought in $120 (R. 112).

Petitioner testified that on October 24 Davis went into a lot of figures and petitioner became emotionally upset because he felt that Davis was not there for the purpose for which he came on October 21 (R. 115). Otherwise, petitioner did not testify concerning the conversation of October 24 or as to the accuracy of the recording of that conversation.

Petitioner's part-time bookkeeper testified to making a journal entry on October 16, 1961, on petitioner's instructions, "Change in policy in entertainment. From this date liquor sales subject to cabaret tax during entertainment hours. The tax is to be deducted from beverage sales, which are subject to a rent charge" (R. 120; Def. Ex. D). He also testified that he had seen the no-dancing sign from time to time since petitioner had begun operating the bar and lounge (R. 118–119).

Petitioner's wife testified that when she discovered that her husband had taken $100 from the safe and $120 from the cashier, she insisted that they should make it up from their own pockets, which they did. The argument about paying Davis lasted all night and almost broke up their home. She protested continuously, but did not contact the Internal Revenue Service (R. 124–125).

5. The trial court, in its charge, called the jury's attention to the allegation of the first count that petitioner's intent was to induce Davis not to examine petitioner's books. The court invited the jury's close scrutiny as to whether the charge concerning this particular, specific intent was supported beyond a reasonable doubt (R. 130–132).

On the question of entrapment, the court instructed (R. 134):

> Now the law with respect to entrapment is this: if a government agent by improper means or overbearing persuasion or wrongful conduct induces a person of ordinary firmness to commit a crime which he would not otherwise commit, then under those circumstances the defendant is to be acquitted, not because he did not do something wrongful but because he was induced to do a wrongful act which he would not otherwise have done.
>
> Now needless to say in all types of law enforcement, particularly with respect to matters involving certain types of regulatory statutes, it is often difficult for the government to get evidence, and government agents may properly, and without violating the law, or their duty, take such steps as make it possible to procure evidence even though such steps involve their own participation, provided that their participation is not a deliberate temptation to men of ordinary firmness, provided that they do not cause a crime to be committed by someone who does not have a criminal disposition to commit that crime.
>
> The burden of proof with respect to entrapment is on the defendant. And you are to ask

> yourself whether in fact on the evidence you heard you are persuaded by the preponderance of that evidence that Agent Davis, as it were, created the crime and the temptation, and he, Agent Davis, was the instigator and author of a crime that would never under any circumstances have taken place, had he not used unfair means.

There were no exceptions to the charge by either party (R. 137). The jury acquitted on count 1 and found petitioner guilty on counts 2, 3, and 4 (R. 137). Petitioner filed no motion for judgment of acquittal during the trial and no motion for a new trial, but did file a motion for judgment notwithstanding the verdict on counts 2, 3, and 4 (R. 6).

ARGUMENT

1. Petitioner claims (Pet. 16–23) that the evidence adduced by the government at his trial shows that he was entrapped and that therefore he was entitled, as a matter of law, to an acquittal. Petitioner, however, by failing to move for a judgment of acquittal at the close of all the evidence, has failed to preserve for appellate review his claim that the evidence was insufficient to sustain his conviction. Rule 29, F.R. Crim. P.; *Cratty* v. *United States*, 163 F. 2d 844 (C.A. D.C.); *Costner* v. *United States*, 271 F. 2d 261 (C.A. 6), certiorari denied, 362 U.S. 952; *Corbin* v. *United States*, 253 F. 2d 646 (C.A. 10); *Picciurro* v. *United States*, 250 F. 2d 585 (C.A. 8); *Ege* v. *United States*, 242 F. 2d 879 (C.A. 9). Petitioner plainly has not shown such manifest injustice or "plain error" as to call for review under Rule 52(b), F.R. Crim. P., not-

withstanding his failure to raise the point in the trial court. Cf. *Battle* v. *United States,* 206 F. 2d 440 (C.A. D.C.); *Lockhart* v. *United States,* 183 F. 2d 265 (C.A. 4).

Petitioner's claim here is plainly an afterthought, based upon the verdict of acquittal on count 1. Petitioner erroneously assumes (Pet. 20) that, since he was acquitted on this count, the government evidence relating to that count must be rejected *in toto,* while his own account of the events of October 21, 1961, must be taken as true. The trial court, however, very strongly suggested in its charge that the government had failed to establish beyond a reasonable doubt the specific intent alleged in count 1 to conceal the sales and receipts of petitioner's business for previous years, in view of the uncontradicted evidence that those records were subsequently made available to the agent. Consequently, it appears that this was the reason for the jury's acquittal on this count. In any event, there is no requirement that a jury's verdict on various counts be consistent. The verdict therefore must be judged, like any other verdict of guilty, upon the basis of all the evidence submitted to the jury.

The evidence at petitioner's trial clearly does not establish as a matter of law that he was entrapped into the payment of money to the federal agent for an improper purpose. In fact, it is difficult to understand upon what basis petitioner's claim of entrapment was even submissible to the jury. The testimony of Agent Davis was that the suggestion and the importuning originated entirely with petitioner. While

Agent Davis unquestionably made an effort at the meeting on October 24 to lead petitioner to confirm the attempted bribe made on October 21, this action clearly did not constitute implanting the original intent or design to commit the crime, which is the essence of entrapment. *Sorrells* v. *United States,* 287 U.S. 435, 441, 453 (majority and concurring opinions); *Sherman* v. *United States,* 356 U.S. 369, 372, 382 (majority and concurring opinions).

Petitioner's own testimony, even if taken as completely true, does not show entrapment. He testified that at the meeting on October 21, upon his own initiative, he invited the agent to assist him in preparing his books and his returns for the payment of the tax and that he paid the $420 for that purpose alone. He testified to virtually nothing relative to the meeting on October 24, except that he got nervous and upset because it did not seem to him that the agent was there for the purpose for which he came on October 21.

2. Petitioner also failed in the trial court to preserve for appellate review his present claim (Pet. 24–27) that the trial court's instructions on entrapment were erroneous since he made no exception to the charge (R. 137). In any event, his contentions are without merit.

Petitioner criticizes the entrapment instruction on two grounds. First, the trial court instructed that government agents may take various steps to procure evidence "provided that their participation is not a deliberate temptation to men of ordinary firmness" (see *supra,* p. 10). Petitioner argues that the correct standard is whether he, not the ordinary person, was

entrapped. However, the trial court's statement is fully consistent with that of the Court in *Sherman* v. *United States*, 356 U.S. 369, 372, that "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." And the statement is in substance identical with the language of the concurring opinion in *Sherman*, 356 U.S. at 384, that agents "should act in such a manner as is likely to induce to the commission of crime only those persons and not others who would normally avoid crime and through self-struggle resist ordinary temptations."

Second, petitioner urges that the court should not have instructed that the burden of proof with respect to entrapment is on the defendant. Conceptual variations as to the nature of entrapment may lead to differing conclusions as to whether it is a defense, whether the burden of proof rests upon the defendant or the government, and whether an initial burden is upon the defendant which is discharged by a *prima facie* showing of entrapment, thus shifting to the government the burden of proving the defendant's ready complaisance to commit the offense. There is no necessity, however, for considering such issues in this case. As we have seen (pp. 12–13), petitioner neither objected to the instruction nor did the evidence of either party sustain a possible inference of entrapment. Any claimed error in the form of the instruction is therefore irrelevant. *United States* v. *Kabot*, 295 F. 2d 848, 855 (C.A. 2), certiorari denied, 369 U.S. 803; *United States* v. *DiDonna*, 276 F. 2d 956 (C.A. 2); *United States* v. *Pagano*, 207 F. 2d 884, 885 (C.A. 2).

3. The electronic recording made of the conversation on October 24 between petitioner and Agent Davis was

properly admitted in evidence, under the authority of this Court's decision in *On Lee* v. *United States*, 343 U.S. 747. There, a federal under-cover agent, who was an old acquaintance of the defendant, went to the defendant's place of business with a radio transmitter secreted on his person and engaged the defendant in conversation. This Court held that a federal agent could testify concerning incriminating statements made by the defendant which he heard over a radio receiver. If anything, the facts of the instant case are more favorable to reception of the recording in evidence. Here, the agent was invited to the meeting with petitioner; there was no pre-existing personal relation between the two men; petitioner knew that he was talking to a federal agent; and the agent who talked to petitioner personally testified to the conversation and was subjected to cross-examination. Agent Davis merely used an instrument to record his conversation with petitioner, in order to prevent relying at the trial entirely on his own paraphrase of the conversation which would necessarily be somewhat inaccurate and to avoid the old problem, which arises frequently in bribery cases, of "an oath against an oath." This procedure, which involves no invasion of privacy, is neither offensive to a sense of fair play nor a violation of the Fourth Amendment.[1]

[1] Contrary to petitioner's contention (Pet. 29–34), *Silverman* v. *United States*, 365 U.S. 505, is inapposite. There, the Court held that the defendant's Fourth Amendment rights were violated because the government had, through a mechanical device, physically entered defendant's premises without authorization. Here, Agent Davis was invited by petitioner into petitioner's office, where the conversation occurred.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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